United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7357

In The

United States Court of Appeals

For The Second Circuit

HERZOG & STRAUS, a partnership organized under the laws of the State of New York,

Plaintiff-Appellant,

-against-

GRT CORPORATION,

Defendant-Appellee.

B

B/S

BRIEF FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

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Appeal No. 76-7357

HERZOG & STRAUS, a partnership organized under the laws of the State of New York,

Plaintiff-Appellant,

GRT CORPORATION,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE GRT CORPORATION

PRELIMINARY STATEMENT

The appellant, Herzog & Straus, appeals from an order of the United States District Court for the Southern District of New York by the Honorable Whitman Knapp, granting summary judgment in favor of defendant-appellee, GRT Corporation ("GRT").

The appellant seeks a reversal of the order granting summary judgment on the grounds that:

A. The Court was without discretion to grant summary judgment sua sponte; and

B. In any event, the Court was in error in granting summary judgment.

GRT seeks an affirmance of the order granting summary judgment because:

A. The Court does have the discretion to grant summary judgment sua sponte; and

B. In the instant case, the Court's decision to grant judgment in favor of GRT was not an abuse of its discretion.

THE ISSUES

1. Does the Court have the discretion to grant summary judgment sua sponte? If the answer be in the affirmative,

2. Was the Court's exercise of such discretion within the permissible bounds of its authority?

STATEMENT OF FACTS

I. THE PARTIES

Appellant, Herzog and Straus, is a New York partnership of certified public accountants, which

claims to be primarily engaged in the business of performing audits of music industry companies on behalf of third party record and publishing companies, recording artists and songwriters to determine whether all royalties to which their clients are entitled are being paid.

The appellee, GRT, is a California corporation engaged in the business of manufacturing, selling and distributing pre-recorded music tapes. GRT often contracts with third parties for the right to manufacture, sell and distribute tapes embodying the musical performances of various recording artists or composers in consideration of which royalties and/or advances are to be paid.

There is no contractual relationship between the appellant and GRT.

II. THE FACTS

A. THE ORDER OF SUMMARY JUDGMENT

On July 12, 1976, an order of the Court granting summary judgment against the appellant was entered on the ground that the appellant conclusively established that it had no cause of action for prima facie tort

by contending and conceding that GRT's conduct was self motivated. In reaching this conclusion, the Court considered, among other things, appellant's complaint; the affidavit of Ira Herzog, a senior partner in appellant's firm; the affidavit of Leonard Ware (Exhibit 1 to the transcript), a director, corporate secretary and general counsel to GRT; and the oral argument of appellant's counsel.

B. THE COMPLAINT

In substance, the appellant's complaint alleges that it had entered into business relationships with three companies for the purpose of conducting audits of GRT's books and records on their behalf, that GRT maliciously notified the companies that it did not wish the appellant to conduct such audits, and that inferentially (since the companies were prepared to accede to GRT's desires) appellant had been damaged. The appellant did not claim a contract with the companies in question nor did it assert a challenge to such companies' right to terminate at will their business relationships with the appellant. It therefore was apparent that the appellant was seeking relief under a prima facie tort theory.

C. THE HERZOG AFFIDAVIT

The appellant also filed an order to show cause seeking preliminary injunctive relief.* In support of the application, Ira Herzog, a senior partner in appellant's firm, submitted an affidavit. In essence the Herzog affidavit reaffirmed appellant's complaint concerning an alleged injury to its business and business relationships and in all respects confirmed that the appellant's business relationships with the companies in question were terminable at will.

The Herzog affidavit, claiming that GRT's conduct was unjustified, goes on to state:

> "10...it clearly appears that defendant's refusal to allow access to GRT's books and records results from plaintiff's success as a result of previous audits of defendant and its divisions in uncovering massive underpayments of royalties owed to plaintiff's clients."

Mr. Herzog, after citing examples to support the appellant's position as above described, goes on to state:

*In its application, appellant sought for itself a mandatory right to audit GRT and an order prohibiting GRT from, among other things, expressing its preference for auditors other than the appellant to examine its books and records.

"11...Apparently, defendant, perturbed that plaintiff was cutting into defendants profits by forcing defendant to fulfill its royalty obligations embarked on a concerted effort to destroy plaintiff's business by preventing it from auditing defendant and its various divisions."

The Herzog affidavit was properly read by the Court as an amplification and clarification of the appellant's complaint. As a result, the Court properly concluded that:

A. The appellant was seeking relief as a result of a prima facie tort;

B. The appellant conceded that GRT's conduct was self motivated;

C. Despite protestations by the appellant to the contrary, GRT's conduct was not unlawful.

D. THE WARE AFFIDAVIT IN OPPOSITION

In opposition to the appellant's motion for preliminary injunction, GRT submitted an affidavit by Leonard Ware, a director, corporate secretary and general counsel.*

The Ware affidavit which was not challenged by the appellant points out that:

*The Ware affidavit was marked by appellant and considered by the Court as Exhibit I to the transcript.

A. GRT has no intention of dishonoring its contractual audit obligations to third parties;

B. None of the contracts between GRT and the third parties in question contain a provision designating the appellant as the party to conduct audits nor is the appellant a third party beneficiary to any such contracts;

C. None of the companies in question complained to GRT (or to the Court) as a result of GRT's objection to the appellant being designated as the auditor of its books and records and all of such companies appear willing to abide by GRT's preference for another accounting firm if such companies chose to perform the audits.

The Ware affidavit states:

> "4. With respect to all three of the contracting companies referred to in the complaint, GRT has communicated its desire that the audit be conducted by a certified public accounting firm other than plaintiff; the reasons therefor originate in past audits conducted by plaintiff which have caused GRT grave concern with respect to the business and accounting practices of plaintiff. GRT therefore believes that its preference, when possible, to have reputable accounting firms other than plaintiff audit its books and records on behalf of third parties, is entirely justified."

"12. GRT believes that it has done nothing actionable by indicating to contracting parties its preference for the employment of auditors other than the plaintiff for the purpose of examining GRT's books and records. It is also convinced that the reasons for such preference are wholly justifiable as a result of past experiences with the plaintiff. GRT fears that the disclosure of its business records to plaintiff will damage GRT's relationships with auditing parties and others, and that such damage may not be quantifiable monetarily."

It is therefore clear and the Court rightly concluded that GRT acted for its own self protection in its dealings with the companies - third parties with whom GRT had contractual and financial relationships, which pre-existed the alleged relationships between those companies and the Herzog firm. It is also clear that GRT, in its dealings, did not and still does not have any reason to believe that appellant's relationship with such third parties constituted anything more than associations terminable at will.

E. THE TRANSCRIPT

On June 28, 1976, at 2:00 P.M., the Court indicated to appellant's counsel that it wished to explore the validity of appellant's cause of action.

A fair reading of the transcript shows the following:

1. The Court pointed out that the Herzog affidavit was inconsistent with the complaint because it asserted a selfish economic motive to GRT's conduct;

2. Appellant's counsel conceded that the appellant contended GRT to be self motivated;

3. The Court pointed out that self motivation is a complete defense in a prima facie tort action since the conduct was not unlawful.

4. Appellant's counsel conceded the action was for intentional interference with business relationships (i.e. prima facie tort) but differed with the Court with respect to its interpretation of the law.

5. In essence, appellant's counsel claimed (as did the Herzog affidavit) that GRT was motivated by a desire to prevent appellant from discovering underpayments of royalties to third parties. Appellant's counsel argued erroneously that under the law this type of motivation was unjustified, unlawful and thereby actionable.

The Court disagreed, stating:

> "'Just Cause' doesn't mean cause you and I would think is just. All it means is legitimate, in the sense that it's for his own self-interest. He is acting exclusively for his own self-interest. He doesn't want you to prove that he is a crook."

6. Appellant, by quoting the transcript out of context in its brief, attempts to show that other theories and arguments were advanced. In fact, it is clear that any reference by appellant's counsel at the hearing to interference with contractual relationships or theories beyond the one espoused above related strictly to appellant's contention that GRT was under contract to third parties in question. Obviously, GRT's contractual relationships with third parties were not and cannot be used as the basis for appellant's cause of action against GRT.*

7. Appellant's counsel was given every opportunity to support or withdraw from its position

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*Appellant now in its brief is claiming contractual and business relationships with the third parties in question. It is apparent, however, that appellant is asserting nothing more than the existence of agreements terminable at will. As a result, appellant at best if allowed to replead, would again have to revert to the prima facie tort theory which cannot be sustained under the circumstances of this case.

by reference to the Ware affidavit, the complaint, the Herzog affidavit and the case law. As a result, it became apparent that appellant's prima facie tort action was grounded on the erroneous assumption that GRT's self motivation was actionable.

Under all of these circumstances, the Court concluded that there were no genuine issues of fact or law to be considered and summary judgment was granted.

POINT I

THE MECHANICAL FAILURE OF EITHER SIDE TO FORMALLY MOVE FOR SUMMARY JUDGMENT SHOULD NOT AFFECT THE COURT'S DISCRETIONARY POWER TO DO JUSTICE IF FAIRLY APPLIED

Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure, the Court has the power to enter a final judgment to which a party is entitled, even if the party has not demanded such relief in its pleadings.* It would appear that the rule is predicated on the theory that the form of the pleadings should not place a limitation upon the

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*Default judgment cases are excepted from this rule presumably because the defaulting party has no opportunity to be heard.

power of the Court to do justice. 6 Moore's Fed. Practice ¶56.12 pp. 56-331; Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 190 (Ct.App. 2d, 1962) cert.denied, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed. 2d 1053 (1962); Harcourt Brace & World Inc. v. Graphic Controls Corp., 329 F.Supp. 517, 171 Patents Quarterly 219 (S.D.N.Y. 1971); LeMon v. Zelker, 358 F.Supp. 554, 555 (S.D.N.Y. 1972); Briscoe v. Compagnie Nationale Air France,290 F.Supp. 863, 867 (S.D.N.Y. 1968).

The purpose of the summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure is to expedite the disposition of actions in which there is no genuine issue of a material fact which requires a trial. The underlying policy of expedition would seem to lie in the requirement of the Court to save both time and money if justice can be dispensed fairly. Time Incorporated v. Bernard Geis Associates, 293 F.Supp. 130, 131 (S.D.N.Y. 1968); Hennessey v. Federal Security Administrator, 88 F.Supp. 664, 668 (D.C.Conn. 1949).

Rule 56 does not expressly refer to Rule 54(c) but there would seem to be no logical purpose in precluding its application to summary judgment provided the party opposing its application had a fair opportunity to present its opposition, after considering all of the facts. U.S. v. State of California, 403 F.Supp. 874, 902 (S.D.Calif. 1975); 6 Moore's Federal Practice ¶56.12, p.56-334.

The great weight of authority dispenses with the formality of a cross motion for summary judgment if in reality no genuine issue of material fact exists, and the non-movant is entitled to summary judgment as a matter of law. Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., supra; Harcourt Brace & World Inc. v. Graphic Controls Corp., supra; LeMon v. Zelker, supra; Briscoe v. Compagnie Nationale Air France, supra; Dickhoff v. Shaughressy, 142 F.Supp. 535, 542 (S.D.N.Y. 1956)

The test for summary judgment would seem to be one of fundamental fairness. That is, the opposing party should not be deprived of an opportunity to consider and present its reasons

for believing material issues of fact to be in dispute. U.S. v. State of California, supra.

In the instant case, neither side took the initial step of submitting a formal motion for summary judgment. Both sides were required, however, to carefully consider the merits of their own and each other's position as set forth in the complaint, the moving and opposing affidavits in order to demonstrate to the Court the probability of success, the cornerstone of an application for a preliminary injunction.

Against this background the appellant was given every opportunity on oral argument and through their motion papers to demonstrate to the Court that the suit was not grouned in prima facie tort; that appellant's association with the third parties in question was not terminable at will; or that the self motivation which each side acknowledged with differing emphasis was actionable.

Even though the Courts generally disfavor the granting of summary judgment sua sponte, under these circumstances, particulary since appellant's difference with the Court related

solely to a narrow question of law, it obviously was fair and just for the Court to grant summary judgment. Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., supra; Harcourt Brace & World Inc. v. Graphic Controls Corp., supra; LeMon v. Zelker, supra; Briscoe v. Compagnie Nationale Air France, supra; Dickhoff v. Shaughressy, supra. The absence of a formal motion should not affect the Court's discretion to do so. 6 Moore's Federal Practice ¶56.12 p.36-338; U.S. v. Fisher-Otis Co., 484 F.2d 1146 (Ct.App. 10th, 1974); Wirtz v. Young Electric Sign Co., 315 F.2d 326 (Ct.App. 10th, 1963).

POINT II

UNDER ANY THEORY, GRT IS ENTITLED TO SUMMARY JUDGMENT

A. Interference with a Business Relationship

A liberal construction of the appellant's complaint and the Herzog affidavit leads to only one conclusion: that appellant was seeking relief from an alleged interference with a noncontractual business relationship. This type of conduct is only actionable if unlawful means are used, or, under the theory of prima facie tort where the interference is the result of an intentional infliction of harm, causing damage, and done without excuse or justification. 32 N.Y. Jur. §40, p.196 and cases cited therein.

It is undisputed that GRT requested the third parties in question (with whom GRT had prior existing financial and contractual relationships) to hire auditors other than the appellant to examine GRT's books and records. Obviously, GRT's request does not constitute unlawful conduct. Indeed, neither the complaint nor the Herzog affidavit describes any unlawful conduct on the part of GRT and it should be apparent that any such claim by appellant's counsel is without any factual support (See Transcript p.11, appellant's brief pg. 22).

Appellant's claim to relief for a prima facie tort similarly must fail because both sides have acknowledged that GRT was self motivated by economic, financial and business considerations in its conduct.*

The case relied upon by the District Court,

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*The appellant claims that GRT's self motivation was predicated upon a desire to prevent the discovery of royalties due to third parties.(Herzog affidavit ¶10 and ¶11; Transcript pg.8. GRT, through Leonard Ware, asserts that GRT's conduct originated in past audits conducted by the appellant which caused GRT grave concern with respect to the appellant's business and accounting practices. Ware also expressed GRT's fear that the disclosure of its business records to the appellant would damage GRT's relationships with auditing parties and others. (Ware Affidavit ¶4 and ¶12).

Benton v. Kennedy-Van Suan Mfg. & Eng. Corp., 2 App.Div 2d 27, 152 N.Y.S. 2d 955 (1956), appropriately states the controlling legal proposition that if the alleged tortfeasor is motivated by self interest and carries out his actions by lawful means, even an intent to destroy the contractual relationship of another will not provide an actionable prima facie tort. Where there exists motives other than those of a solely malicious nature (e.g., profit, business advantage or self-benefit), and illegal means are not employed, no action for prima facie tort will lie. Squire Records, Inc. v. Vanguard Records, Inc., 25 App.Div. 2d 190, 268 N.Y.S. 2d 251 (1966). See also Wegman v. Dairylea Cooperative Inc., 50 A.D. 2d 108, 376 N.Y.S. 2d 728 (1975).

B. Interference with a Contractual Relationship Terminable at Will.

Despite the absence of such allegations in the complaint or the Herzog affidavit, appellant would now have the Court believe that the complaint is grounded on the theory of intentional interference with contractual relationships as well as intentional interference with business relationships. Although the existence of a contractual relationship was never asserted, we will

assume arguendo that the assertion is true. Under these circumstances even the appellant will have to acknowledge that at best its "contracts" with third parties in question were terminable at will. No other construction can be placed upon the pleadings or the Herzog affidavit and even now the appellant does not assert contracts of a stated duration.

The general rule relating to tortious interference with contractual relationships is stated in Noah v. L. Daitch & Co., 22 Misc. 2d 649, 192 N.Y.S. 2d 380, 386 (1959); see also Coleman & Morris v. Picciotta, 279 App.Div. 656, 107 N.Y.S. 2d 715 (1951); Licht v. Rosenthal & Slotnick, Inc. 32 N.Y.S. 2d 150 (1941); Franklin Enterprises Corp. v. King Refrigerator Corp., 207 Misc. 956, 141 N.Y.S. 2d 734 (1955). In substance, the rule is that where a party has merely an "at-will" business relationship, a third party incurs no liability for inducing its termination for the purpose of advancing its own economic interest unless the means employed to accomplish the interference were dishonest or unfair.

Since both sides have asserted that GRT acted primarily to protect its own economic and contractual interests, GRT is entitled to summary judgment even if under the facts of this case appellant were to plead and prove the existence of "contracts" terminable at will.

C. Intentional interference with a Contract of a Definite Duration

Although it would stretch credulity to do so, one might even go so far as to assume arguendo that appellant's claim of interference relates to contracts of a definite term or duration.* Even if this were the case, the rules described above are applicable with equal force and GRT would be entitled to summary judgment because it acted in furtherance of legitimate business and economic interests, i.e. the need to prevent the appellant by lawful means from prejudicing its relationship with the third parties in question and others.

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*The appellant has made no such claim (even in its brief) and all of the facts lead to an opposite conclusion.

Liability for tortious interference of either type of contract is subject to the requirement that the acts be unexcused, unprivileged and unjustified. As expressed in Restatement of Torts (1939):

> Sec. 769: One who has a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relations[illegible]ith a third person in that business if the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the relations.
>
> ***
>
> Sec. 773: One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third person by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction.

These principles have been recognized and applied in New York and elsewhere. In re Farrell Publishing Corp., 165 Fed. Supp. 40 (1958), aff'd sub nom; Hendler v. Cuneo Eastern Press, Inc., 279 F.2d 181 (2d Cir. 1960); Knapp v. Penfield, 143 Misc. 132, 256 N.Y.S. 41, 44-45 (1932); Johnson v. McKee Baking Co., 398 Fed. supp. 201 (S.D.Va. 1975); Martin v. Texaco, Inc., 304 Fed.Supp. 498 (S.D.Miss. 1969); cf Pierce Ford Sales,Inc.

v. Ford Motor Co., 299 F.2d 425 (2d Cir. 1962); Zoby v. American Fidelity & Loan Co., 242 F.2d 76 (4th Cir. 1957); and Felson v. Sol Cafe Mfg. Corp., 24 N.Y. 2d 682, 301 N.Y.S. 2d 610, 249 N.E. 2d 459 (1969); and Morrison v. Frank, 81 N.Y.S. 2d 743 (1948).

In substance, the cases above cited hold that a defendant is privileged, excused and justified to interfere with any third party contract which threatens its own contractual financial or business interests provided it does so in a fair and lawful manner. The record clearly shows that GRT's conduct falls within this rule.

POINT III

THE APPELLANT ERRONEOUSLY CONTENDS THAT THE JUSTIFICATION FOR GRT'S CONDUCT MUST BE PLEADED AND PROVED AS AN AFFIRMATIVE DEFENSE

The appellant also claims that summary judgment should not be granted because GRT is required to prove that its conduct was

justified by affirmatively defending the action. As authority for this proposition, the appellant cites State Enterprises, Inc. v. Southridge Coop. Sec. 1, Inc., 18 App.Div. 2d 226, 238 N.Y.S. 2d 724, 726 (1963). A fair reading of that case, however, demonstrates that the Court reached its conclusion only because the plaintiff had already demonstrated that it had a prima facie case.

In the instant case, the Ware affidavit specifically states that GRT believes its conduct to be justified and as a result, summary judgment or the dismissal of the cause of action are entirely appropriate since the pleadings and affidavits demonstrate that there is no real factual dispute concerning the existence of GRT's defenses of justification or privilege. Zoby v. American Fidelity & Loan Co., supra; Felsen v. Sol Cafe Mfg. Corp., supra; and Coleman & Morris v. Pisciotta, supra.

CONCLUSION

For all of the reasons set forth above, the order of summary judgment in favor of GRT against the appellant should be affirmed, together with the costs and disbursements of this action.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

HEROZ & STRAUS
Plaintiff-Appellant,

- against -

GR T CORP.,
Defendant- Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, **James A. Steele,** *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* **310 West 146th Street, New York, New York**

That on the **28th** *day of* **October** *19*76 *at* **630 Fifth Avenue, New York, New York**

deponent served the annexed **Brief** *upon* **Anderson Russell Kill & Olick, P.C.**

the **Attorneys** *in this action by delivering* 2 *true copy* s *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **28th**
day of **October** *1976*

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4023156
Qualified in Queens County
Commission Expires March 30, 1978

James A. Steele
JAMES A. STEELE